No. 82-1771

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments require suppression of evidence seized by police relying in good faith upon a search warrant issued by a judge who reasonably, if mistakenly, concluded that the supporting affidavit furnished probable cause.

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INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

This case presents a recurrent application of the Exclusionary Rule, one which defeats the purpose of criminal trials--ascertaining truth--and

disserves an essential objective of the Fourth Amendment--encouraging resort to warrants. California's courts, like our federal courts, feel compelled by decisions of this Court to exclude evidence seized by police acting in good faith reliance upon a search warrant issued by a magistrate who reasonably, if mistakenly, concluded that the underlying affidavit supplied probable cause. Perhaps no application of the Exclusionary Rule is more inconsistent with its announced purpose of deterring police misconduct. Perhaps no other application of the Rule so offends the public conscience as suppressing the truth because a police officer has obeyed a judge's command. Our interest in protecting the integrity of our courts and the reliability of their verdicts brings the People of the State of California before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

A search warrant issued by a judicial magistrate should not be vulnerable to attack on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

The present contrary rule began life as an accident, matured into an unexplained assumption, and survives as an obstacle to an essential objective of the Fourth Amendment--encouraging the use of warrants--and to the central purpose of criminal trials--ascertaining the truth. Embraced before the fundamental purpose of the Exclusionary Rule was clearly defined, the present practice is now seen as self-defeating; police are not deterred from engaging in unlawful conduct, but are instead

discouraged from doing precisely what the Constitution commands: securing a warrant from a neutral, detached magistrate.

The indiscriminate approach to suppression followed in Mapp v. Ohio (1961) 367 U.S. 643, 655, is irreconcilable with the balancing approach later adopted in Calandra v. United States (1974) 414 U.S. 338, restricting the Exclusionary Rule "to those areas where its remedial objectives are thought most efficaciously served." Id. at 348. Calandra and its progency compel reexamination of the earlier decisions in Aguilar v. Texas (1964) 378 U.S. 108, overruled on other grounds, Illinois v. Gates (1983) 51 U.S. Law Week 4709, Whiteley v. Warden (1971) 401 U.S. 560, and Giordenello v. United States (1958) 357 U.S. 480. While the results in those cases may be consistent with our proposed rule, their rationale cannot be reconciled with Calandra.

Applying the reasonable, good faith standard inherent in this Court's recent decisions, the judgment of the United States Court of Appeals for the Ninth Circuit must be reversed.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED BY POLICE ACTING IN GOOD FAITH RELIANCE UPON A WARRANT ISSUED BY A JUDGE IN THE REASONABLE, IF MISTAKEN, BELIEF THAT THE SUPPORTING AFFIDAVIT SUPPLIED PROBABLE CAUSE.

1. Introduction

Amicus challenges the existing judicial practice of suppressing evidence seized under a warrant issued without probable cause. This Court has never explained why exclusion is a relevant, much less necessary, sanction for erroneous determinations by state magistrates. To this day, Aguilar v. Texas (1964) 378 U.S. 108, is a rule without a reason. Instead, the rule followed should be:

> A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

This Court first reversed a state court judgment on the basis of a deficient search warrant affidavit in Aguilar v. Texas. That decision has been widely accepted as authority for imposition of the Exclusionary Rule. See, e.g., United States v. Karathanos, 531 F.2d 26, 33, cert. denied (1966) 428 U.S. 910. In re Martinez (1970) 1 Cal.3d 641, 651 n.8, 83 Cal.Rptr. 382, 389 n.8. In fact, Aguilar did not impose the Exclusionary Rule either expressly or impliedly. The Court uttered not a single word on that subject because it was informed at page five of

the Brief for Respondent that a Texas statute, Article 727a, VACCP, enacted in 1925, provided:

> "No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted into evidence against the accused on the trial of any criminal case."

This Court decided only that the affidavit failed Fourth Amendment standards. Evidence obtained pursuant to the warrant based upon that affidavit was excluded by state statute not constitutional compulsion. Application of the Exclusionary Rule was not before the Court, much less decided, in Aguilar.

Nevertheless, two years later the Court filed its brief per curiam order

in Riggin v. Virginia (1966) 384 U.S. 152, declaring:

> "The petition for a writ of certiorari is granted. The judgment is reversed. Aguilar v. Texas, 378 U.S. 108."[1]

Aguilar was not authority for reversal, however, because Virginia, unlike Texas, admitted illegally seized evidence as a matter of state law. Hall v. Commonwealth (Va. 1924) 121 S.E. 154, cited in appendix to Elkins v. United States (1960) 364 U.S. 206, 232. This Court, like the state appellate court, simply assumed that Aguilar authorized suppression. Riggin v. Commonwealth (Va. 1965) 144 S.E.2d 298, 301-302. In its pleading

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1. The Court previously filed a similar summary reversal order in Barnes v. Texas (1965) 380 U.S. 253. In light of the Texas statute, Barnes added nothing to Aguilar.

before this Court the Commonwealth did not suggest otherwise. Thus, without argument, without a hearing, without explanation and, apparently, without consideration, Aguilar was deemed authority for a rule it did not announce.

Five years later, in Whiteley v. Warden (1971) 401 u.S. 560, a divided Court again suppressed evidence seized by state officers under a warrant issued without probable cause. Again, no explanation for exclusion was offered. This time, the single sentence ordering suppression was followed by a citation to Mapp v. Ohio (1961) 367 U.S. 643, instead of a reference to Aguilar. Since Mapp was not a warrant case, it did not add to the Court's legal reasoning.[2/]

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2. Ironically, Whiteley's author would have overruled Mapp. Coolidge v. New Hampshire (1971) 403 U.S. 443, 490 (concurring opinion of Mr. Justice Harlan).

In fairness, it must be noted that the warden's nine-page brief did not suggest the inappropriateness of applying the Exclusionary Rule.

Whiteley's reliance on Mapp was almost predictable since the Mapp plurality did declare, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 367 U.S. at 655. As applied to warrant cases, of course, the quoted language is dictum. That the dictum was followed in Whiteley is ultimately traceable to the fact that "the discursive prevailing opinion in Mapp v. Ohio . . . does not clearly identify the primary basis for the rule. . . ." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 670 (1970).

If Aguilar was accidental, Whiteley was not. Still, Whiteley was the product

of historical chance. This Court confronted the warrant cases before it clarified the fundamental purpose of the Exclusionary Rule: deterrence of police misconduct. Had the clarification preceded the application, a different rule should have emerged. This conclusion applies with equal force to decisions suppressing the fruits of warrant searches in federal criminal prosecutions. E.g., Nathanson v. United States (1933) 290 U.S. 41; Giordenello v. United States (1958) 357 U.S. 480; Spinelli v. United States (1969) 393 U.S. 410.

Amicus submits that recent decisions of this Court refining its purpose compel reformulation of the Exclusionary Rule invoked here by the Court of Appeals for the Ninth Ciruit.

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2. Purposes of the Exclusionary Rule

A. The Personal Right Theory

Unlawfully seized evidence was first suppressed to remedy an invasion of the accused's personal Fourth Amendment right of privacy. Weeks v. United States (1914) 232 U.S. 383, 398; Connolly v. Medalie (2d Cir. 1932) 58 F.2d 629, 630. Under this theory evidentiary use of illegally seized property constituted a continuing violation of protected privacy. Bernardi, The Exclusionary Rule: Is A Good Faith Standard Needed to Preserve A Interpretation of the Fourth Amendment?, 30 De Paul L.Rev. 51, 56 (1908) Subsequently, this Court explained that

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' home

> and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965)." United States v. Calandra (1974) 414 U.S. 338, 347. Accord, Elkins v. United States (1960) 364 U.S. 206, 217.

Since the constitutional violation is complete at the moment of unlawful intrusion, Stone v. Powell (1976) 438 U.S. 465, 540 (dissent of White, J.), subsequent use, direct or indirect, of the products of the intrusion "work[s] no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. at 354-355. Abandonment of the personal right theory by severing the remedy from the right makes possible the complete repudiation of the Exclusionary Rule. Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59

Minn. L.Rev. 251, 254, 271 (1974).

B. The Imperative of Judicial Integrity

The "imperative of judicial integrity" was the next doctrine devised to justify suppression of evidence. First styled the "clean hands" or "dirty business" doctrine, this concept originated as rhetoric inspired by the common desire of Justices Brandeis and Holmes to impose the Exclusionary Rule before accumulated experience had indicated the inadequacy of existing alternatives. Olmstead v. United States (1927) 277 U.S. 438, 470, 483-484 (dissenting opinions of Brandeis, J., and Holmes, J.). Both justices clearly identified their views as non-constitutional law, however. Id. at 466, 469-470, 479.

Thereafter, Elkins v. United States, 364 U.S. at 217, Mapp v. Ohio (1961) 367 U.S. 643, 660, and Linkletter v. Walker,

381 U.S. at 635, all contained a "ritualistic reference" to the "imperative of judicial integrity." Schrock and Welsh, 59 Minn. L.Rev. at 263.

The essence of the "imperative" has proved elusive. Sometimes couched in terms of judicial self-respect, it appears more concerned with public respect for the judiciary. Under this theory exclusion is necessary to avoid judicial complicity in unlawful police conduct. See Bernardi, 30 De Paul L.Rev. at 56-57. Acknowledged as non-constitutional law by its innovators, the doctrine has been criticized as unconstitutional by one commentator, Monaghan, The Supreme Court 1974 Term, Forward: Constitutional Common Law, 89 Harv. L.Rev. 1, 5 (1975), and as "a bootless and rarefied essence" by others, Schrock and Welsh, 59 Minn. L.Rev. at 265.

While a rhetorical success, the judicial integrity doctrine is an analytical failure. The reason is plain: "exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system.' Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214, 223 (1978). Accord, State v. Bisaccia (N.J. 1971) 279 A.2d 675, 676-677; Burger, Who Will Watch the Watchman, 14 Am. U.L.Rev. 1, 12 (1964); Thompson, The Burger Court in the California Crystal Ball, 5 S.W. U.L.Rev. 238, 240-241 (1973). Dean Barrett asks,

> "Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?"

Barrett, Exclusion of Evidence Obtained by Illegal Searches - A Comment on People v. Cahan, 43 Calif. L.Rev. 565, 582 (1955). The public answers "Yes." "The solid majority of Americans rejects the idea that '[t]he criminal is to go free because the constable has blundered.'" Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L.Rev. 1027, 1035 (1974). Accord, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 927 (1973). In 1981 a national magazine poll revealed that 70 percent of those asked had little or no confidence in the ability of our courts to convict and sentence criminals. NEWSWEEK, March 23, 1981, p. 49. "[T]he prototype of these complaints is enforcement of the exclusionary rule," Professor Kaplan adds. 26 Stan. L.Rev. at 1035-1036.

The Exclusionary Rule applies notwithstanding the inadvertent or minimal nature of the police intrusion or the heinous nature of the accused's offense. "[T]his lack of proportionality," Kaplan explains, "demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence." Ibid. Removed from the context of egregious police misconduct the judicial integrity doctrine becomes self-defeating.

The "imperative of judicial integrity" has not been the basis for deciding cases. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 669 (1970). Despite the "imperative," defendants may be brought to trial although illegally seized outside the jurisdiction. Gerstein v. Pugh (1975) 420 U.S. 103, 119; Frisbie v.

Collins (1952) 342 U.S. 519. Their prosecutions may be initiated by indictments supported by illegally seized evidence. United States v. Calandra, 414 U.S. at 349-352. At trial, defendants may not challenge on Fourth Amendment grounds evidence that was obtained by police in violation of another's right of privacy. United States v. Salvucci (1980) 448 U.S. 83, 94; Alderman v. United States (1969) 394 U.S. 165. Nor may the accused object to evidence improperly seized by a private citizen. Burdeau v. McDowell (1921) 256 U.S. 465. Evidence indirectly derived from an unlawful search may be admissible if sufficient "attenuation" is shown, Brown v. Illinois (1975) 422 U.S. 590, and the direct fruits of the search may be used to impeach the defendant, Walder v. United States (1954) 347 U.S. 42. Even

if improperly admitted, unconstitutionally obtained evidence may be declared "harmless". Chapman v. California (1967) 386 U.S. 18. Evidence secured in violation of the Fourth Amendment may be considered for purposes of sentencing, United States v. Schipani (2d Cir. 1970), 435 F.2d 26, 28, cert. denied, 401 U.S. 983 (1972), and probation revocation, United States v. Vandemark (9th Cir. 1975) 522 F.2d 1019, 1021. Further, Fourth Amendment claims are unreviewable on habeas corpus. Stone v. Powell (1976) 428 U.S. 465; In re Sterling (1965) 63 Cal.2d 486. None of these decisions, nor those refusing to apply the Exclusionary Rule in civil proceedings, United States v. Janis (1976) 428 U.S. 433, or retroactively, Linkletter v. Walker, supra, Desist v. United States (1969) 394 U.S. 244, can be squared with the "imperative of judicial integrity."

The judicial integrity theory failed the retroactivity test. "[I]n Linkletter deterrence became the dispositive consideration in the exclusion controversy." Sunderland, Liberals, Conservative, and the Exclusionary Rule, 71 J. Crim. L. & C. 343, 352 (1980). "Indeed, all of the cases since Wolf [v. Colorado (1949) 338 U.S. 25] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." Linkletter v. Walker, 381 U.S. at 636-637. The retroactivity cases taught that judicial integrity is not impaired by the introduction of evidence seized in good faith reliance on existing constitutional norms. United States v. Peltier (1976) 422 U.S. 531, 537.

The deterrence rationale did not merely eclipse the judicial integrity

theory, it absorbed it. Relegated to marginal status in Calandra, 414 U.S. at 355, n.11, the judicial integrity doctrine ceased to exist independently in Michigan v. Tucker (1974) 417 U.S. 433, 450 n.25:

> "It has been suggested that courts should exclude evidence derived from 'lawless invasions of the constitutional rights of citizens,' Terry v. Ohio, 392 U.S., at 13, in recognition of 'the imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222 (1960). This rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent

basis for excluding challenged evidence."

The Court's reasoning was elaborated in United States v. Janis, 428 U.S. at 458 n.35:

> "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is completed by the time the evidence is presented to the court. See United States v. Calandra, 414 U.S. at 347, 354. The focus must therefore be on the question whether the admission of evidence encourages

> violations of the Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

See also Stone v. Powell, 428 U.S. at 485; Tisnado v. United States (9th Cir. 1976) 547 F.2d 432, 456. Just as abandonment of the personal right theory makes possible complete repudiation of the Exclusionary Rule, the decline of the judicial integrity rationale clears the way for the Rule's reform.

C. The Deterrence Rationale

The fall of the judicial integrity doctrine marked the rise of the deterrence rationale. Deterrence has now become the "sole consideration" governing this Court's suppression of evidence. Sunderland, 71 Judicature at 353. Coincidentally, the

deterrence rationale appears to have come full circle. Always concerned with discouraging "unlawful police conduct," United States v. Calandra, 414 U.S. at 347, suppression of evidence originally was intended as a substitute for punishment of the offending officer. "Deterrence" meant that the officer would not have acted as he did had he known that the courts would exclude illegally obtained evidence. The critical element was the officer's state of mind: he should have known better. Thus Elkins and Mapp spoke of "removing the incentive" to disregarding Fourth Amendment rights. 364 U.S. at 217, 222; 367 U.S. at 656. This view was a natural consequence of the fact that Mapp and Weeks v. United States (1914) 232 U.S. 383, involved flagrant Fourth Amendment violations. See Traynor, Mapp v. Ohio

at Large in the Fifty States, 1962 Duke L.J. 319, 322.

As time passed and police methods improved the Court's focus shifted from sanctioning official misconduct to giving new substantive content to the Fourth Amendment. "Deterrence" came to mean motivation of "the law enforcement profession as a whole--not the aberrant individual officer--to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights." Dunaway v. New York (1979) 442 U.S. 200, 221 (concurring opinion of Stevens, J.). The Exclusionary Rule became a tool for expanding judicial review.

The broadened deterrence rationale is seriously flawed. It assumes that Fourth Amendment rules will be explicitly formulated and effectively communicated. In fact, neither condition exists.

Bernardi, 30 De Paul L.Rev. at 77 n.153. Instead, the rules governing search and seizure have been made hopelessly complex. Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L.Rev. 736, 740 (1972). Rules which cannot be understood cannot deter. Additionally, "[t]here is reason to believe that the channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the rule." Oaks, 37 U.Chi. L.Rev. at 730. Lack of communication between police and prosecutors is aggravated by the delay endemic to the judicial process. Few officers, apprised of the reviewing court's evaluation of their actions, can remember the specific circumstances in which, long ago, they acted. Moreover, the institutional deterrence concept fails to appreciate that the exclusion sanction

is powerless to deter conduct not directed at gathering evidence. Barrett, Personal Rights, Property Rights and the Fourth Amendment, 1960 Supreme Court Review 46, 54-55.

This Court recently recognized that an Exclusionary Rule disassociated from the state of mind of the acting officer does not deter. In Michigan v. Tucker (1974) 417 U.S. 433, 447, the Court said

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or in their future counterparts, a

> greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

This Court has reinstated its original concept of deterrence, one that demands a plausible causal connection between the sanction of exclusion and the future conduct of the police.

D. The Judicial Review Function

The Exclusionary Rule serves a fourth purpose: it affords judicial review of Fourth Amendment claims, thereby allowing the Court to reformulate substantive rights. Judicial opinions rarely have alluded to this justification. United States v. Peltier, 422 U.S. at 554 (dissenting opinion of

Brennan, J.); Illinois v. Gates, 51 U.S.L.W. 4709, 4723 (concurring opinion of White, J.). Of course, one cannot reasonably expect a court to admit it suppresses the truth and releases criminals into society in order to provide grist for the judicial mill. Commentators have noted this function of the suppression doctrine, however. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L & C. 255, 260 (1961); La Fave, 1 Search Seizure, A Treatise on the Fourth Amendment, 29, 33-34 (1978); Oaks, 37 U.Chi. L.Rev. at 756; Bernardi, 30 De Paul L.Rev. at 101; Sunderland, 71 Judicature at 373.

The substantive results of judicial access to the Fourth Amendment via the Exclusionary Rule have drawn mixed reviews. Professor La Fave concludes "[o]ne of the virtues of the exclusionary rule . . . is that it provides the higher

courts with a sufficiently steady diet of Fourth Amendment issues to make possible a meaningful shaping of constitutional standards governing arrest and seizure." 1 Search and Seizure at 33-34. Bernardi, on the other hand, argues that this Court has so compromised substantive privacy rights with evidentiary consequences that "the present exclusionary rule, instead of befriending the fourth amendment, may have become the primary hindrance to its liberal interpretation." 30 De Paul L.Rev. at 101. Bernardi would agree that "a remedy--restrictive result is preferable to a right--destructive result." Note, 55 Wash. L.Rev. 849, 861 (1980). To the extent that development of Fourth Amendment rights is influenced by either the distasteful consequence of suppression or by recognized limitations on the Rule's deterrent effect, e.g., Terry v.

Ohio (1968) 392 U.S. 1, 12-13, Bernardi correctly concludes that the purpose of judicial review is subverted. 30 De Paul L.Rev. at 81.

Whatever may be its substantive limitations, the Exclusionary Rule is thought to resolve two problems of judicial review: jurisdiction and incentive to litigate. Similar difficulties arise in the context of retroactivity. In Stovall v. Denno (1967) 388 U.S. 293, 306, speaking through Mr. Justice Brennan, the Court explained that "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law," disfavor purely prospective decisions.

Justice Brennan's fear, expressed in dissent in Peltier, is that a rule which diverts judicial inquiry from the objective reasonableness of police conduct to the policeman's subjective state of mind will have the practical effects of discouraging defendants' Fourth Amendment claims and of restricting judicial attention to police motives. 422 U.S. at 554. Who will urge new law if the inevitable response must be that the challenged evidence is admissible because the officer acted in good faith reliance on old law?

A reasonable good faith standard, by retaining an objective element permits, even necessitates, judicial review. Bernardi, 30 De Paul L.Rev. at 101. "Only after the search and seizure has been determined to be illegal may the judge, ruling on the exclusion question, determine if the officer at

the time he acted knew or should have known that his conduct was impermissible." Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915, 942 (1978). For example, in United States v. Calandrella (6th Cir. 1979) 605 F.2d 236, 247-252, the reviewing court first decided that a search violated the rule of United States v. Chadwick (1977) 433 U.S. 1, then held Chadwick nonretroactive.

Linkletter v. Walker (1965) U.S. 618, 622 n.3, answers jurisdictional objections:

> "It has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. . . . However, no doubt was expressed of our power in

> England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)."

California's former Chief Justice agrees:

> "Each part of the bifurcated decision springs from an actual controversy between the parties. . . . each part of the decision is essential to a proper resolution of the case. Neither is dictum."

Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 Hast. L.J. 533, 560 (1977). Accord, Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L.Rev. 201, 216-217 (1965); Beytagh, Ten Years of Non-retroactivity: A Critique and A Proposal, 61 Va. L.Rev. 1557, 1615 (1975).

Thus, a decision holding police conduct unreasonable in the constitutional sense but admitting evidence because the police acted in good faith and with a reasonable basis for the belief that their conduct was lawful does not constitute an advisory opinion forbidden by the case or controversy requirement of Article III of the federal Constitution.

The Court may feel it has presently available more cases than required to define the contours of the Fourth Amendment. See Arkansas v. Sanders (1979) 442 U.S. 753, 757. At all events, the Court need not worry about a lack of future litigants. As Justice Traynor points out, "institutional litigants with recurring interests in overturning legal rules would find incentive and reward enough" in achieving reforms regardless of whether their individual clients

directly benefitted. 28 Hast. L.J. at 547. Professor Beytagh concurs:

> "A public defender's office, for example, would have considerable incentive to seek a change in constitutional rules even though the benefit would accrue only to those involved in later cases. So would other organizations that regularly represent criminal defendants. . . . [T]he chances seem slim indeed that a constitutional issue of some importance, as to which a judge-made change in law is a reasonable possibility, will not be raised and presented effectively." 61 Va. L.Rev. at 1614.

3. Deterrence in the Balance

Assessing the deterrent effect of the Weeks rule, Mr. Justice Jackson

concluded in 1954,

> "What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violations are not sanctions which put an end to illegal search and seizure by federal officers. . . . The extent to which the practice was curtailed, if at all, is doubtful."

Irvine v. California (1954) 347 U.S. 128, 135 (plurality opinion).

Empirical studies conducted since support no different conclusion today. Commentators uniformly pronounce these studies "inconclusive". E.g., Oaks, 37 U.Chi. L.Rev. at 709; Sunderland, 71 J. Crim. L. & C. at 365; Bernardi, 30 De Paul L.Rev. at 75; Canon, The Exclusionary Rule: Have Critics Proven

That It Doesn't Deter Police?, 62 Judicature 398, 403 (1979); Schlesinger, The Exclusionary Rule: Have Proponents Proven That It Is A Deterrent To Police?, 62 Judicature 404, 405 (1979). "[A]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed." United States v. Janis, 428 U.S. at 449-450. Worse, reliable statistics do not appear to be forthcoming. Id. at 450-453.

Absent empirical evidence the Exclusionary Rule rests upon the assumption that it acts as a substantial and efficient deterrent. United States v. Janis, 428 U.S. at 453. This is a precarious perch, for the Rule's deterrent force "is not so inherently likely that we can assume it to exist in the absence

of proof." Wright, 50 Tex. L.Rev. at 741. On the contrary, the presumption of deterrence conflicts with common experience. Undeniably, the Rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Terry v. Ohio (1968) 392 U.S. 1, 14. At the same time, "No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future." People v. Gurley (1972) 23 Cal.App.3d 536, 553, 100 Cal.Rptr. 407, 419. Accord, Michigan v. Tucker (1974) 417 U.S. 433, 447. Police cannot follow rules they cannot fathom. In any event, the police officer infrequently learns that his actions have been judicially

condemned, Kaplan, 26 Stan L.Rev. at 1032, and the sanction of suppression is indirect, Schlesinger, 62 Judicature at 408. "With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine." Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics (1971) 403 U.S. 388, 416 (dissenting opinion of Burger, C. J.). Moreover, while the sanction is limited to evidence offered at trial, most cases are plea-bargained. Professor Oaks concludes: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." 37 U.Chi. L.Rev. at 755. Although statistical evidence is inconclusive there are many reasons to doubt the Rule's efficacy as an indirect deterrent.

Recognition that deterrence is a fragile assumption rather than a hard fact made all but inevitable the balancing approach adopted in United States v. Calandra (1974) 414 U.S. 338. Calandra signalled a discriminating application of the suppression doctrine that is the antithesis to Mapp:

> "As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." 414 U.S. at 348.

Balancing deterrence against potential damage to the role and functions of the grand jury, the Court found that "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," 414 U.S. at 351, and, therefore, refused to extend the Exclusionary Rule to grand

jury proceedings.

Following Calandra, the Court found insufficient deterrent effect to warrant extending the Exclusionary Rule to civil proceedings, United States v. Janis, 428 U.S. at 454, or to federal habeas corpus, Stone v. Powell, 428 U.S. at 487, 489-495. For the same reason the Court refused to suppress evidence seized incident to arrest pursuant to a subsequently invalidated statute, Michigan v. De Fillippo (1979) 443 U.S. 31, or evidence seized during a search conducted under long-standing judicially approved administrative regulations later held unconstitutional, United States v. Peltier, 422 U.S. at 538-542. In Michigan v. Tucker (1974) 417 U.S. 433, 446-447, deterrence was weighed and found wanting in a Fifth Amendment exclusionary context. These decisions are consistent with pre-Calandra rulings

limiting retroactive operation of new Fourth Amendment doctrine, e.g., Desist v. United States (1969) 394 U.S. 244, 254 n.24, and permitting impeachment use of illegally seized evidence, Walder v. United States (1954) 347 U.S. 62.

The reasoning in Calandra cannot be confined to considering whether to expand the scope of the Exclusionary Rule. Although each of the cited decisions refused to extend the Rule, for the same reason United States v. Salvucci (1980) 448 U.S. 83, 94-95, narrowed the Rule by overruling the "automatic standing" doctrine of Jones v. United States (1960) 362 U.S. 257. The Court's determination not to subvert the guilt determining process of a criminal trial by suppressing evidence unless "the sanction serves a valid and useful purpose," Michigan v. Tucker, 417 U.S. at 446, invites reform, not mere resistance to change. The logic

of Calandra's balancing approach leads ineluctably to the conclusion reached in United States v. Peltier, 422 U.S. at 542:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

"The Constitution does not demand judicial overkill." People v. Carnesi (1971) 16 Cal.App.3d 863, 869, 94 Cal.Rptr. 555, 558.

Calandra, Tucker, Stone, Janis, Peltier, and De Fillippo lead to the conclusion that suppression is an irrelevant sanction when evidence is

acquired pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free of material misrepresentation. Indeed, one California court has reached that conclusion in dictum:

> "The rule excluding evidence obtained by unconstitutional means was developed to deter unlawful police conduct. It has no reasonable application where police officers in good faith submit the question of whether they have probable cause for judicial evaluation." People v. Kirk (1974) 43 Cal.App.3d 921, 925, 117 Cal.Rptr. 345, 347. Accord, State v. Gerardo (N.J. 1969) 250 A.2d 130, 133.

Ironically, evidence is nevertheless suppressed when the police act exactly as the magistrate commands while, in various other situations,

evidence is admitted when the erring police have acted in reasonable good faith.

4. Present Acceptance of Good Faith Exceptions to Exclusionary Rule

A good faith standard already has gained limited acceptance in the form of exceptions to the present Exclusionary Rule. These exceptions fall into two general categories: "technical violations" and "good faith mistakes." Mr. Justice Powell described as "technical" Fourth Amendment violations in which "officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional. . . ." Brown v. Illinois (1975) 422 U.S. 590, 611 (concurring opinion of Powell, J.) (Footnote deleted). Because suppression does not deter undesirable conduct in such cases

Justices Powell and Rehnquist would not apply the Exclusionary Rule. Id. at 612. In these circumstances suppression discourages desired police conduct.

In Michigan v. De Fillippo, the Court agreed, holding valid an arrest made in good faith reliance on a city ordinance later held unconstitutionally vague. "A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional," the Court explained. 443 U.S. at 37-38.[3/]

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3. De Fillippo creates a qualified exception. Where the statute invoked does not define a substantive criminal offense but instead expressly authorizes searches and seizures infringing Fourth Amendment rights the Court has stricken the statute rather than upheld the search. Ybarra v. Illinois (1979) 444 U.S. 85, 96 n.11; Berger v. New York (1967) 388 U.S. 41. This distinction may be explained by the requirements of judicial review. Judicial scrutiny of a statute denouncing criminal conduct is a

(Footnote continued on next page.)

Deterrence is both unlikely and undesirable. "Society would be ill served if police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." Id. at 38. Why a police officer may rely upon the constitutional validity of a legislative enactment but not upon a magistrate's assessment of constitutional sufficiency is a puzzle.

Footnote 3 continued:

necessary incident of affirming a conviction. Upholding executive actions taken under a search statute, however, effectively removes the legislation from court review. The difference between Peltier and Ybarra is that Almeida-Sanchez v. United States (1973) 413 U.S. 266, provided the Court the opportunity to invalidate the regulation under which the searching officer acted in Peltier. Having condemned the agency's regulation in Almeida-Sanchez, the Court could condone the officer's reliance in Peltier.

In warrant cases, of course, evaluation of the sufficiency of the supporting affidavit necessarily precedes inquiry into the bona fides of the magistrate or the officer.

That both questions are ultimately for judicial determination only heightens the mystery.

Just as De Fillippo and Peltier establish that law enforcement may rely upon a statute or regulation not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws," Michigan v. De Fillippo, 443 U.S. at 38, the Court's retroactivity decisions make clear that officers may rely upon judicial decisions. E.g., Fuller v. Alaska (1968) 393 U.S. 80, 81.

Why police may rely on appellate court determinations but not upon those of trial courts or magistrates also remains unclear. State courts meanwhile have shown increasing reluctance to suppress evidence seized pursuant to defective warrants supported by probable cause.

People v. Lent (N.Y. Sup.Ct. 1980) 433 N.Y.S.2d 538, upheld a search incident to an arrest pursuant to a warrant, which, unknown to the arresting officer had been withdrawn. People v. Arnow (N.Y. Sup.Ct. 1981) 436 N.Y.S.2d 950, characterized a magistrate's failure to endorse a warrant for nighttime service as a "techincal defect" not requiring exclusion of evidence. Sternberg v. Superior Court (1974) 41 Cal.App.3d 281, 115 Cal.Rptr. 893, declined to suppress evidence because a magistrate had inadvertently neglected to sign the warrant after finding probable cause. Each opinion emphasized the good faith reliance of the police.

The "good faith mistake" exception includes both reasonable mistakes of law and of fact. Mr. Justice White has articulated its rationale:

> "When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstance in the future. . . ." Stone v. Powell (1976) 428 U.S. 465, 540) (Dissenting opinion of White, J.).

This Court has accepted the good faith mistake of fact exception in another context. Franks v. Delaware (1978) 438 U.S. 154, limits attacks on warrant affidavits to false statements made intentionally or with reckless disregard for their truth.

Each of these good faith exceptions

is compelled by the balancing approach of Calandra. Just as the rationale of Calandra cannot be confined, these exceptions cannot be contained. In other words,

> "The decisional history of the exclusionary rule following Mapp must be seen as a gradual, yet inexorable movement towards adoption of a good faith standard to govern application of the rule." Bernardi, 30 De Paul L.Rev. at 58.

Four Justices of this Court have expressed a willingness to so modify the Exclusionary Rule. Chief Justice Burger, concurring in Stone v. Powell, 428 U.S. at 536-542, Mr. Justice White, dissenting in Stone v. Powell, 428 U.S. at 536-542, and concurring in Illinois v. Gates, 51 U.S. Law Week at 4718, and Mr. Justice Powell, joined by

Mr. Justice Rehnquist, concurring in Brown v. Illinois, 422 U.S. at 609-612, all have supported some form of good faith test. Mr. Justice Blackmun recognized that good faith significantly reduces deterrence in United States v. Janis, 428 U.S. at 459 n.35. All subscribed to Peltier's dictum that the deterrent purpose of the Exclusionary Rule is served "only if it can be said that the law enforcement officer had knowledge, or may be properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542.

Since the bulwark of the Fourth Amendment is the Warrant Clause, Franks v. Delaware, 438 U.S. at 164, and "[t]he entire thrust of the exclusionary rule . . . is to encourage the use of search warrants," People v. Moore (1973) 31 Cal.App.3d 919, 927, 107 Cal.Rptr. 590, 595, it makes no sense to discourage

police from seeking warrants from neutral, detached magistrates. Who is the Aguilar rule supposed to deter? If the police have acted as they should, suppression must sanction magistrates. But there is "no evidence for the assumption that lawlessness among federal magistrates „is a pervasive problem akin to police lawlessness" which inspired adoption of the Exclusionary Rule. LaFave, 1 Search and Seizure, A Treatis on the Fourth Amendment, 3 (1978), quoting Professor Phillip Johnson. The same may be said in defense of state judicial magistrates.

5. The Good Faith Exclusionary Rule as an Objective Standard

Critics of the present Exclusionary Rule recognize its "important symbolic significance," Kaplan, 26 Stan. L.Rev. at 1055, and acknowledge that it

"teaches the importance attached to observing" Fourth Amendment guarantees. Oaks, 37 U.Chi. L.Rev. at 722. Critics of proposed good faith rules fear that "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio (1964) 379 U.S. 89, 97. A good faith rule incorporating an objective element responds to both views: it reaffirms the importance of obeying the Fourth Amendment; it affords an avenue of judicial review; it avoids placing a premium on police ignorance; it averts suppressing the truth when no deterrent purpose can be served. Such a rule is offered in United States v. Peltier, 422 U.S. at 542:

"[E]vidence obtained from a

> search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

To adopt the Peltier standard generally or to adapt it specifically to the warrant context is not to embrace the unknown. Useful guidance for applying the new rule is found in opinions elaborating the reasonable good faith defense to suits for damages under the Civil Rights Act, 42 U.S.C. § 2283. See generally, Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915 (1978). These decisions establish a qualified immunity from civil liability for reasonable, good faith actions.

> "The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable." Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (2d Cir. 1972) 456 F.2d 1339, 1348.

A belief is "reasonable" if it is "reasonable" in the tort sense, although not in the constitutional sense. Id. at 1348-1349 (concurring opinion of Lumbard, J.). This standard is consistent with the qualified immunity principles developed in Pierson v. Ray (1967) 386 U.S. 547, Scheuer v. Rhodes (1974) 416 U.S. 232, Wood v. Strickland (1975) 420 U.S. 308,

and Procunier v. Navarette (1978) 434 U.S. 555. The burden of proof as to both good faith and reasonableness is placed upon the government.

Reinforcing the objective element of the good faith defense to civil suits is the requirement that officers be aware of "settled, indisputable law" and "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. at 321-322. No less should be demanded of magistrates. Police are not expected to predict the future course of constitutional law, however. Pierson v. Ray, 386 U.S. at 557. No more should be demanded of magistrates.

> "The law does not expect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law,

> it is not unreasonable to expect them to have some knowledge of it." Glasson v. City of Louisville (6th Cir.) 518 F.2d 899, 910, cert. denied, 423 U.S. 930 (1975).

Consistently with this rule Peltier penalizes actions if an officer "had knowledge, or may properly be charged with knowledge," of their unconstitutionality. 422 U.S. at 542. This does not undermine the deterrent effect of the Exclusionary Rule, which depends upon police training programs. A reasonable good faith suppression standard would not discourage police legal training. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L.Rev. 1319, 1412-1413 (1975). Accord, Bernardi, 30 De Paul L.Rev. at 106. At the same time, "the good faith standard will prevent the government from choosing

to violate the fourth amendment willfully whenever it is prepared to pay civil damages as the price for securing desired evidence." Bernardi, 30 De Paul L.Rev. at 102. Cf. People v. Martin (1955) 45 Cal.2d 755, 760.

Our proposed rule governing warrant cases incorporates an objective standard. The good faith of the issuing magistrate and the executing police officer does not abrogate the Exclusionary Rule if the supporting affidavit is so lacking in the indicia of probable cause as to render official reliance upon it wholly unreasonable. The affidavits condemned in Nathanson v. United States, 290 U.S. at 44, Giordenello v. United States, 357 U.S. at 481, Aguilar v. Texas, 378 U.S. at 109, and Whiteley v. Warden, 401 U.S. at 563, for example, should fail our

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test.[4/]

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4. It is in the area of warrantless searches and seizures that the evidentiary consequence of a good faith Exclusionary Rule will be most felt. In the probable cause context "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." Bringar v. United States (1949) 338 U.S. 160, 176. Frequent disputes between trial and appellate judges and among reviewing judges themselves as to whether probable cause existed on a given state of facts suggests that the present standard does not leave enough room for police error. Stone v. Powell, 428 U.S. at 538, 540 (dissenting opinion of White, J.). Increased police training cannot substantially decrease police misjudgments regarding probable cause because "There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances." People v. Ingle (1960) 2 Cal.Rptr. 14, 17. Accord, Go-Bart Importing Co. v. United States (1931) 282 U.S. 344, 357. The reasonable good faith test will be more tolerant of police error, particularly when officers have acted in urgent circumstances. "An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation." Whirl v. Kern (5th Cir. 1969) 407 F.2d 781, 790. Studied reflection in judicial chambers often produces a decision different from intuitive response on dangerous streets. To the extent these perspective diverge, exclusion is unlikely to deter.

CONCLUSION

Suppression of evidence is self-defeating when the police do precisely what the Constitution commands: secure a warrant from a neutral, detached magistrate. Indeed, the oft-invoked "preference for warrants," United States v. Ventresca (1965) 380 U.S. 102, 109-110, may well spring from the understood absurdity of excluding evidence not because a constable has blundered, but because a magistrate has miscalculated. State v. Lien (Minn. 1978) 265 N.W.2d 833, 840 n.1.

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The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

DATED: August 4, 1983

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